



EUROPEAN CENTRAL BANK

EUROSYSTEM

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Proportionality as organising principle of banking regulation

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Proportionality in European Banking Regulation

Athens, 13 February 2017

The general notion of the proportionality principle

- Obligation to balance conflicting principles when making policy choices to maximise the protection of each objective of the legal system
- Overall function in the legal order – coherence function
- Ranking of principles: some have constitutional value
- Relevant for different powers (legislative and executive) (judiciary: ex- post check) and levels of governance (EU and national; legislative, regulatory implementation, individual implementation through decisions)
- ECJ different intensity of proportionality test for
 - Horizontal check (EU institutions regulations)
 - Vertical check (national implementing law regulations)
 - Individual decisions

Proportionality in banking law:

- The main tensions are among the following principles:
 - the consolidation of the internal market, financially stable and with economic growth, versus
 - the fundamental freedom to conduct a business and the right to property
- essential role of procedural rights
- At three different levels
 - Legislation
 - General administrative acts
 - Individual administrative acts
- With an adequate set of tools

Proportionality in legislation

- Degree of harmonisation
 - Choice of maximum harmonisation with some exceptions
- Form of the proposed legislation
 - Split option: directive + regulation
 - Remark: the form is not the only determinant of level of onerosity
- Possibility to open some spaces to administrative discretion
 - But: proportionality applies to competent authorities at every level
- Could the different sources of regulation, although *per se* proportionate, produce a disproportionate effect (overregulation)?

Recital 46 CRR

*The provisions of this Regulation respect the principle of proportionality, having regard in particular to the diversity in size and scale of operations and to the range of activities of institutions. Respect for the principle of proportionality also means that the simplest possible rating procedures, even in the Internal Ratings Based Approach (·IRB Approach·), are recognised for retail exposures. **Member States** should ensure that the requirements laid down in this Regulation apply in a manner proportionate to the nature, scale and complexity of the risks associated with an institution's business model and activities. **The Commission** should ensure that delegated and implementing acts, regulatory technical standards and implementing technical standards are consistent with the principle of proportionality, so as to guarantee that this Regulation is applied in a proportionate manner. **EBA** should therefore ensure that all regulatory and implementing technical standards are drafted in such a way that they are consistent with and uphold the principle of proportionality.*

Recital 66 CRD IV

[.....] **The provisions of this Directive** on remuneration should reflect differences between different types of institutions in a proportionate manner, taking into account their size, internal organisation and the nature, scope and complexity of their activities. In particular it would not be proportionate to require certain types of investment firms to comply with all of those principles.

Recital 92 CRD IV

The Commission and EBA should ensure that those standards can be applied by all institutions concerned in a manner that is proportionate to the nature, scale and complexity of those institutions and their activities.

Proportionality in general administrative acts

- Exercise of O&D
 - Possibility not to make use of an option
 - Some options have not been used (see for example LSIs)
 - Possibility of exempting some categories
 - Regulation (EU) 2016/445 of the ECB exempts the banks under the restructuring power of the Commission
 - Drawing different regimes for different categories
 - Regulation (EU) 2015/534 of the ECB distinguishes three different categories of LSIs

The use of O&D cannot go as far as to run counter the main objective of the Regulation (harmonisation), e.g. by encouraging the fragmentation of the legal framework.

THIS IS THE RISK THAT MEMBER STATES SOMETIMES RUN

Proportionality in individual decision making

- Various examples can be considered
 - Supervision of SIs: methodology, intensity and frequency of checks are proportionate with the dimensions, complexity, high risk profile, systemic relevance.
 - Supervision LSIs: prioritisation; development of standards and policies on the basis of prioritisation (ex ante, prioritised; ex post, low priority); notifications and reporting framework, prioritisation
 - Imposition of conditions for the approval as a less intrusive option than a rejection
 - Potential overlap between some early intervention measures (more intrusive) and supervisory measures

Intensity of judicial control on national implementing legislation

The “strict test”:

- Appropriate to attain the intended aim
- Necessary to achieve the objective (no less damaging means could achieve the objective)
- Member States must also demonstrate that the implementing law uses means that are the least detrimental to the objectives and principles laid down in Union legislature
- If the objective of the action conflicts with the Union objectives, proportionality has been violated.

Limits to the freedom as to the means, when implementing EU legislation in national law: proportionality is NOT to choose the least onerous instrument for the national banks; it **is to aim at the objectives of the EU legislation**, internal market and banking union, including enhancing the consistency of the supervision of the institutions across the EU, **taking into account also the new ECB responsibilities**. In doing so, the most proportionate means should be used.

Conclusions

- Through the proportionality principle, EU constitutional principles come into play
- Proportionality is not monolithic: different intensity in the vertical judicial control and in the horizontal judicial control
- Proportionality does not impose the use of directives, rather if the instrument better suited to achieve the objective
- There is a pervasive and intense application of proportionality in banking law, given the necessity to reconcile different interests and given the multiplicity of levels of governance, the many actors with sometimes concurrent competences and the still quite diversified reality
- This is why the importance of the principle can only grow overtime, and why the Court will apply a strict test, fostering the realisation of the objective of a single market.

